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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

CLYDE CLIFTON MURPHY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

I. Whether Petitioner's conviction in violation of the "felony-murder merger doctrine" denied him due process and equal protection of the law as guaranteed him under the Fourteenth Amendment to the United States Constitution;

II. Whether the State of Texas violated Petitioner's right to Due Process of law as guaranteed him under the Fourteenth Amendment to the United States Constitution when it unfairly played upon the same act twice in order to "bootstrap" itself into a first degree murder charge;

III. Whether the State of Texas, by unfairly playing upon the exact same act twice in order to convict Petitioner of felony-murder, violated principles of Double Jeopardy under the Fifth Amendment to the United States Constitution as made applicable to the states by and through the Fourteenth Amendment to the United States Constitution.

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2. Clyde Clifton Murphy

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Whether Petitioner's conviction in violation of the "felony-murder merger doctrine" denied him due process and equal protection of the law as guaranteed him under the Fourteenth Amendment to the United States Constitution;

Whether the State of Texas violated Petitioner's right to due process of law as guaranteed him under the Fourteenth Amendment to the United States Constitution when it unfairly played upon the same act twice in order to "bootstrap" itself into a first degree murder charge;

Whether the State of Texas, by unfairly playing upon the exact same act twice in order to convict Petitioner of felony-murder, violated principles of Double Jeopardy under the Fifth Amendment to the United States Constitution as made applicable to the states by and through the Fourteenth Amendment to the United States Constitution.

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PRAYER

The Petitioner, CLYDE CLIFTON MURPHY, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Texas Court of Criminal Appeals, the Texas criminal court of last resort, issued on the 21st day of December, 1983, and from which rehearing was finally denied on March 7, 1984.

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

A copy of the opinion of the intermediary Texas Court of Appeals for the Ninth Supreme Judicial District at Beaumont, Texas, is attached hereto as "Appendix A."

Subsequently, that decision was reviewed as to some expressly limited issues and the written opinion of the Texas Court of Criminal Appeals, including a dissenting opinion on Petitioner's Motion for Rehearing, is attached hereto as "Appendix B."

Petitioner's Second Motion for Rehearing in the Texas Court of Criminal Appeals was denied on March 7, 1984. A copy of said denial is attached hereto as "Appendix C."

JURISDICTION

The Texas Court of Criminal Appeals, on December 21, 1983, affirmed the decision of the intermediary Texas Court of Appeals for the Ninth Supreme Judicial District, and Petitioner's Second Motion for Rehearing was denied on March 7, 1984. Jurisdiction of the court is invoked under Title 28, United States Code, § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> " . . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The then-applicable version of § 19.02(a)(3), Texas Penal Code (felony murder), provided:

"(a) A person commits an offense if he:

(3) Commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and furtherance of the commission or attempt, or in the immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

The pertinent portions of the arson statute, § 28.02, Texas Penal Code, as originally enacted and from which the language of the indictment was drawn, provided:

"(a) A person commits an offense if he starts a fire . . .

(2) with intent to destroy or damage any . . . habitation to collect insurance for the damage or destruction."

(b) An offense under this section is a felony of the second degree, unless any bodily injury less than death is suffered by any person by reason of the commission of the offense, in which event it is a felony of the first degree."

STATEMENT OF THE CASE

Petitioner, CLYDE CLIFTON MURPHY, was charged by felony indictment in the 159th Judicial District Court of Angelina County, Texas, with the offense of murder. Relying upon arson as the underlying, predicating felony, the indictment drew upon § 19.02(a)(3), *supra,* commonly referred to as the "felony-murder rule." A true and correct copy of the indictment is attached hereto as "Appendix D."

Appellant pled not guilty to the indictment and trial was had before a jury. Viewing the evidence in a light most favorable to the state, it showed that:

(1) A fire had been designedly set in a small wood frame rent house owned by Petitioner.

(2) Petitioner was found in a state of shock at the scene of the fire and had visible burns about his body.

(3) Petitioner's cousins, one of whom was the deceased, had been living in the rent house but had been in the process of moving out.

(4) At the time of the fire, the deceased, unbeknownst to Petitioner, was apparently "passed out drunk" underneath a bed and burned to death in the fire.

Petitioner lived in a trailer house about fifty yards from the small rent house that caught fire. He testified at the trial that he woke up in the middle of the night and heard someone screaming. His subsequent attempt to rescue the deceased was unsuccessful, as he was overcome by heat and smoke. Petitioner denied setting the house on fire.

There was no evidence of any motive or ill will on the part of the Petitioner towards the deceased. To the contrary, they were cousins and loved each other. The State produced no evidence that Petitioner knew or had reason to believe that anyone was inside the house, even assuming that he set the fire, as theorized by the State.

The jury found Petitioner guilty as charged and set his punishment at the maximum allowed under Texas law: Ninety-nine (99) years' confinement at the Texas Department of Corrections, and, in addition thereto, a fine of ten thousand dollars ($10,000.00).

On appeal to the intermediary Texas Court of Appeals for the Ninth Supreme Judicial District at Beaumont, Texas, Petitioner raised some nine grounds of error, most of which were aimed at either trial error or plain error in both the indictment and instructions to the jury.

In his Grounds of Error One through Three, before the intermediary court, Petitioner raised the precise issues that he now seeks to have addressed by the United States Supreme Court. Those three issues were then stated thusly:

(1) The scope of V.T.C.A., Penal Code, § 19.02 (a), does not extend to situations where the act alleged to have caused the death is inherent in the underlying felony or a direct result thereof.

(2) Appellant's conviction under V.T.C.A., § 19.02 (a)(3), based on the single act of starting a fire in a habitation, violated his right against being twice being placed in jeopardy as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution.

(3) Appellant's conviction under V.T.C.A., Penal Code, § 19.02(a)(3), deprived him of due process and equal protection at law in violation of the Fourteenth Amendment to the United States Constitution, in that the prosecution was thereby relieved of proving beyond a reasonable doubt that Appellant had any criminal intent to cause the death of the complainant.

The intermediary court cited *Ex Parte Easter*, 615 S.W.2d 719 (Tex. Crim. App. 1981), a case readily distinguishable on its facts, and then summarily overruled the above three Grounds of Error raised by Petitioner.

Petitioner then sought discretionary review from the State's court of last resort in criminal cases, the Texas Court of Criminal Appeals, in Austin, Texas. His Petition for Discretionary Review was granted, however, with specific instructions that the issues to be reviewed would be confined to the "felony-murder merger doctrine" and the aforementioned plain error issues.

On December 21, 1983, the Texas Court of Criminal Appeals issued an en banc opinion affirming the judgment of the intermediary court of appeals. Essentially, the Texas Court of Criminal Appeals refused to apply the "felony-murder merger doctrine" to the facts of Petitioner's case. Though the indictment alone, on its face, would compel a different conclusion, the Texas Court of Criminal Appeals wrote:

> "Unlike *Garrett*[1], Appellant's *act* (emphasis added) of arson in setting the habitation on fire, and the resulting homicide of the victim, were not one and the same.[2]

---

1. *Garrett v. State*, 573 S.W.2d 543 (Tex. Crim. App. 1978).

2. The court appears to use interchangeably, and perhaps confuse, *acts* and *offenses*.

Petitioner responded to the affirmance by a stout Motion for Rehearing, which drew a strong dissenting opinion by Judge Marvin Teague. See "Appendix B."

Nonetheless, Petitioner's Motion for Rehearing was denied on February 8, 1984.

Petitioner then filed his Second Motion for Rehearing, which was again denied on March 7, 1984. See "Appendix C."

REASONS FOR ALLOWANCE OF THE WRIT

A. DUE PROCESS DEPRIVATION; circumvention of traditional notions of mens rea.

Many states have outright abolished the "felony murder" rule. Cf. *People v. Aaron,* 299 N.W.2d 304 (Mich. 1980).

In those states where the rule has survived, it has been subject to the "merger doctrine" as a limitation to its application. See gennerally comment, *The merger doctrine as a limitation on felony murder rule: A balance of criminal law principles.* 13 Wakeforest L. Rev. 369 (1977).

Under the "felony-murder merger doctrine", the felony that eliminates the requisite intent for murder must be one *independent of the homicide.* Stated another way, it cannot be based upon a felony that is an integral part of the homicide and which the evidence shows to be an offense included *in fact* within the offense charged. See *Garrett, supra; People v. Moran,* 246 N.Y. 100, 158 N.E. 35 (1927); *People v. Ireland,* 450 P.2d 80, 75 Cal. Rptr. 188 (1969).

As Petitioner urged in his Motion for Rehearing before the Texas Court of Criminal Appeals, the "felony-murder merger" rule does not come to an abrupt standstill simply because the precedent felony is *not* a lesser included offense of murder, such as assault, voluntary or involuntary manslaughter. If the *act* which constitutes the gist of the underlying felony is the *same act* alleged to have been clearly dangerous to human life, then the principles of *Garrett* apply. To be sure, in *Garrett*, it was written:

> ". . . The state is thus attempting to use the *very act* [emphasis added] which caused the homicide, committed an aggravated assault by the use of a deadly weapon, as the felony which boosts the homicide itself into the murder category." 573 S.W.2d 543, 545.

Many states have, in addition to the "merger doctrine", further limited the rule by confining its application to specific felonies that have been designated as "inherently dangerous" by their legislatures.

In the State of Texas, the "felony-murder rule" lives on. Furthermore, unlike many states, the State of Texas does not limit application of the rule to felonies deemed "inherently dangerous"; the rule applies to any felony.[3]

Texas focuses on the nature of the *act* (which must be clearly dangerous to human life) committed in the *furtherance* of the underlying felony, as opposed to the inherent nature of the underlying, predicating offense. However, Texas has traditionally required that the *act* committed

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3. The rule was even extended to a barroom shooting where the underlying felony was the act of bringing the pistol into the barroom in the first place. See *Rodriguez v. State*, 548 S.W.2d 26 (Tex. Crim. App. 1977).

in the *furtherance* of the underlying felony be *another voluntary act.* See § 19.02(a)(3), *supra;* see also Judge Teague's dissenting opinion to the overruling of Appellant's Motion for Rehearing in this case, at 665 S.W.2d 116, 120, 121.

Accepting arguendo the State's theory in this case, Petitioner committed but a single act, namely, starting the fire, which simulanteously caused the death of another. The State neither alleged nor proved *another voluntary act,* independent of the precedent conduct, so as to bring this case *within* the "felony-murder rule" and *without* the "felony-murder merger doctrine."

The failure or refusal of the State of Texas to recognize the "felony-murder merger doctrine" as a bar to the application of the felony murder rule in this case has denied Petitioner due process and equal protection of the law. Specifically, the State of Texas has had Petitioner sentenced to ninety-nine (99) years, on the one hand, while, on the other hand, completely circumventing proof of any culpable mental state otherwise required for the offense of murder and that kind of harsh punishment.

Petitioner says that this is the sort of Due Process issue that cries out for justice. In *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240 (1952), it was reiterated:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as much universal and persistent in mature systems of law as belief in freedom of the human will and consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost

> as instinctive as a child's familiar exculpatory 'but I didn't mean to', and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as a motivation for public prosecution." 342 U.S. 246, 250, 251.

There could be only one reason for the State's taking an arson case and impermissibly stretching it into a murder trial. It was to increase the punishment range from that of a second degree felony to the higher range of a first degree felony. If Petitioner had been tried and convicted of arson, his maximum punishment exposure would have been twenty (20) years' confinement, and, in addition thereto, a fine of five thousand dollars ($5,000.00). This would have been true, even had the proof shown that someone had been killed as a result of the arson. See § 28.02(b), *supra,* wherein the punishment *then* applicable for arson was set out as follows:

> "(b) An offense under this section is a felony of the second degree, unless any bodily injury *less than death* is suffered by any person by reason of the commission of the offense, in which event it is a felony of the first degree."[4]

If Petitioner's conviction is allowed to stand, then the State can boost virtually any death associated with the commission of a felony into murder, regardless of the lack of any corresponding culpable mental state. The margin for Due Process abuse is as wide as one's imagi-

---

4. In 1981, the Texas Legislature amended § 28.02 by adding a new subsection (c) that provided for first degree felony punishment (the same as for murder) in cases where bodily injury or death is suffered by reason of the arson. See also Judge Teague's comments in that regard in his dissent to the overruling of Appellant's Motion for Rehearing at 665 S.W.2d 116, 120, 121.

nation. To illustrate, a first degree murder charge, rather than involuntary manslaughter, would lie whenever a person previously convicted of driving while intoxicated gets intoxicated and is involved in a fatal accident. The hypothetical indictment might read:

> ". . . did then and there unlawfully, after having been previously convicted of driving while intoxicated, *drive and operate a motor vehicle upon a public highway while intoxicated* and, while in the course of and furtherance of said offense, did cause the death of John Doe by committing an act clearly dangerous to human life, namely, *drive and operate a motor vehicle upon a public highway while intoxicated.*"

The State has not only ignored, but has gotten away with a Due Process deprivation in this case. An unjust result has been brought about.

B. DOUBLE JEOPARDY IMPLICATIONS.

This case presents a unique and novel twist to the continuous evolution of the Double Jeopardy Clause, albeit not in the classical sense of being tried twice for the same offense or multiple prosecution for the same transaction.

In the case at bar, the State of Texas has attempted to split an indivisible transaction into separate parts, so that a greater offense could be charged. Stated another way, the State has achieved the greatest punishment short of the death penalty by unfairly playing upon the same act twice. The jeopardy comes in, not by having to stand trial over again, but in receiving an additional 77 years' confinement that he could not have received had he been convicted only of arson.

The State employed the *act* of starting a fire in order to sustain the allegations and proof of the underlying arson; then, the State turns around and alleges the *exact same act* yet a second time in order to boost the offense into the category of murder. An unjust result has been achieved by the State.

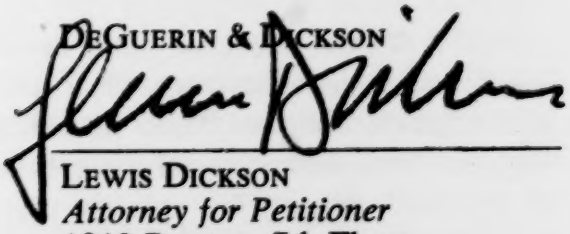
In summary, the "felony-murder merger doctrine", or any concept of "merger" for that matter, whether it has to do with multiple convictions or cumulative punishments, has its nexus in the Double Jeopardy clause. If Petitioner's conviction was obtained in violation of the "felony-murder merger doctrine", *and it was,* then the Double Jeopardy clause is implicated right along with the Due Process clause.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Honorable Court will grant this his Application for Writ of Certiorari and that he will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

DEGUERIN & DICKSON



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Respondent.

CERTIFICATE OF SERVICE

LEWIS DICKSON, a member of the Bar of this Court, certifies that pursuant to Rule 28, he served the preceding Petition for Writ of Certiorari by enclosing a copy of this document in envelopes, first-class postage prepaid and addressed to:

Mr. Wesley Hoyt
Assistant District Attorney
Angelina County
P. O. Box 908
Lufkin, Texas 75901

State Prosecuting Attorney
P. O. 12405
Austin, Texas 78711

and depositing the envelopes in the United States Post Office, San Jacinto Station, Houston, Texas 77002, on May 2nd 1984, and further certifies that all parties required to be served have been served.

LEWIS DICKSON

NO. _____

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NOTARIZED STATEMENT OF MAILING

Respectfully submitted,

DEGUERIN & DICKSON

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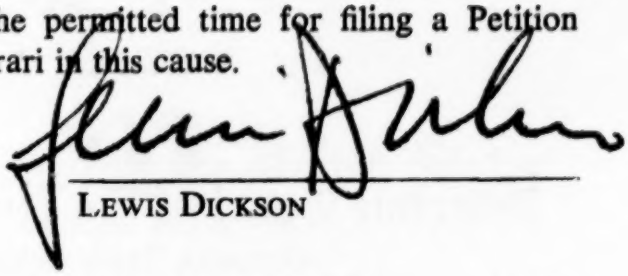
NOTARIZED STATEMENT OF MAILING

I, Lewis Dickson, being first duly sworn, pursuant to Rule 28.2, do state that I am a member of the Bar of this Court, and that I know that forty (40) copies of the Petition for Writ of Certiorari in the case of Clyde Clifton Murphy, Petitioner v. The State of Texas, Respondent, was deposited on May 2nd, 1984, in the United States Mail, General Post Office, Houston, Texas 77001, in an envelope by certified mail, postage prepaid, along with my check for $200.00 for the docketing fee. Said petition was properly addressed to the Clerk, Supreme Court of the United States, Washington, D. C. 20543.

I do further state that the date of mailing, May 2nd, 1984, is within the permitted time for filing a Petition for Writ of Certiorari in this cause.



LEWIS DICKSON

SUBSCRIBED AND SWORN TO before me on this the 2nd day of May, 1984.

Gail G. Rutherford

GAIL G. RUTHERFORD
Notary Public in and for
The State of Texas
My commission expires 6-26-85

APPENDIX A

NO. 09-81-069 CR

CLYDE CLIFTON MURPHY, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Angelina County

(Filed September 29, 1982)

OPINION

Appellant was charged by felony indictment with the offense of murder under the provisions of *V.T.C.A., Penal Code,* § 19.02, the "Felony-Murder Rule."

Following appellant's plea of "not guilty," a jury found appellant guilty as charged, and assessed his punishment at confinement in the Texas Department of Corrections, at ninety-nine years, and, in addition thereto, a fine of $10,000. Appellant has duly perfected this appeal.

It was charged in the indictment that appellant:

> ". . . did then and there commit the felony offense of arson by then and there starting a fire in a habitation located in Angelina County, Texas, owned by Clyde Clifton Murphy, with intent to damage and destroy said habitation and to collect insurance for such damage and destruction, and while in the course of and furtherance of the commission of said offense did then and there commit an act clearly dangerous to human life, to-wit: did start a fire in a habitation, and did thereby cause the death of an individual, John Thomas Johnson. . . ."

Part I

Appellant's first ground of error follows:

> "The scope of V.T.C.A., Penal Code, Section 19.02 (a)(3) does not extend to situations where the Act alleged to have caused the death is inherent in the underlying felony or a direct result thereof."

V.T.C.A., Penal Code, Sec. 19.02(a)(3), provides:

> "(a) A person commits an offense if he:
>
> * * *
>
> "(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

The argument is that the State used the same act which occasioned the homicide, namely, "starting a fire in a habitation," as the gravamen of the felony which boosts the homicide itself into the murder category. Appellant cites *Garrett v. State,* 573 S.W.2d 543 (Tex. Cr. App. 1978).

There, the underlying felony alleged was an aggravated assault by threatening the decedent with a pistol. Almost the same act was also alleged to be the dangerous act which resulted in decedent's death, namely, pulling a loaded pistol from his pocket to scare the deceased. Our appellant argues that criminal liability for causing a particular result is not justified in the absence of a corresponding state of mind. In *Garrett v. State,* supra, the

court drew upon Judge Cardozo's language in *People v. Moran*, 246 N.Y. 100, 158 N.E. 35, 36 (1927):

> "The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein. . . ."

In *Ex parte Easter*, 615 S.W.2d 719 (Tex. Cr. App. 1981), the petitioner made the same argument as in the case at bar and relied on *Garrett v. State*, supra. The Court wrote:

> "Petitioner's reliance upon the cited cases is misplaced. It is well settled that one who, intending to commit a felony, accidentally commits another felony, is guilty of the felony actually committed.
>
> * * *
>
> "The felony murder rule as now embodied in the present Penal Code dispenses with inquiry into the mens rea accompanying the homicide itself." (at 720 and 721, respectively)

The first ground of error is overruled.

Ground of error number two is "appellant's conviction under V.T.C.A., Sec. 19.02(a)(3) based on the single act of starting a fire in a habitation violated his right against being twice placed in jeopardy as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution." Appellant cites no case which supports this contention, and we have found none addressing it. This ground of error is overruled.

Appellant's third ground is essentially the same as his first ground of error which we have already addressed. It is overruled.

Ground of error number five follows: "The trial court committed reversible error by permitting the prosecution, over timely objection, to introduce certain irrelevant testimony concerning extraneous fires." A deputy sheriff testified that in talking with the appellant he (the deputy) "brought up the fact that there had been a previous fire." Over objection, the deputy was permitted to testify that a house in "Rivercrest" where appellant lived had burned; that a house on 103 East (presumably where appellant lived) had a small fire; that both of these houses had been insured; appellant denied ever asking "Maston Murphy" to burn a house down to collect the insurance, which the deputy testified "Maston Murphy" had told him (the deputy).

Of course it is true, as appellant argues, in Texas an accused is entitled to be tried on the accusation lodged by the charging instrument and not for some collateral offense or for being a criminal generally. See *Albrecht v. State,* 486 S.W.2d 97 (Tex. Cr. App. 1972). However, in the case at bar, appellant testified concerning these prior fires and denied any wrongdoing. Therefore, we find the error harmless. See the authorities cited in *Thomas v. State,* 572 S.W.2d 507, 512 (Tex. Cr. App. 1978). See also, *V.T.C.A., Penal Code,* Sec. 6.02(b). We overrule this ground of error.

Appellant's sixth ground of error complains: "The indictment herein is fundamentally defective in that, while attempting to set out the constituent elements of arson, it fails to allege an essential element thereof and hence, does not state an offense."

Sec. 28.02, *V.T.C.A., Penal Code,* now reads:

> "(a) A person commits an offense if he starts a fire . . . with intent to destroy or damage any . . . habitation . . .
>
> * * *
>
> "(2) knowing that it is insured against damage or destruction."

Here, the State failed to aver knowledge. However, *V.A.C.C.P.*, Art. 21.13, provides:

> "An indictment for an act done with intent to commit some other offense may charge in general terms the commission of such act with intent to commit such other offense."

This ground of error is overruled.

Appellant's seventh ground complains of a charge to the jury to which he did not object. *V.A.C.C.P.*, Art. 36.14; *Grady v. State*, 614 S.W.2d 830 (Tex. Cr. App. 1981). This ground of error is overruled.

The eighth ground of error urges: "The failure of the instant indictment to attribute some culpable mental state to the alleged act of starting a fire rendered the same fundamentally defective." Appellant argues he could have accidentally started the fire, knowing the building was insured, and yet have not committed an offense. There are no cases, apparently, addressing this contention as to arson. *V.T.C.A., Penal Code*, Sec. 6.02(b), requires:

> "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."

The indictment in this case is partly presented in a previous paragraph of this opinion and avers "with intent to damage and destroy said habitation and to collect insurance for such damage and destruction. . . ." We believe this complies with the statute.

We have examined appellant's ninth ground of error asserting that the indictment was fundamentally defective because it failed to charge that he acted with the requisite mental state. No motion to quash or exceptions were levelled at the indictment. We find no merit to the complaint. See the authorities cited in the discussion of the seventh ground of error.

Part II

We have disposed of all except one of appellant's complaints and this part of the opinion will be confined to the fourth ground of error asserting that the denial of his motion for mistrial "after certain evidence concerning polygraph examinations was injected into the trial before the jury" was reversible error.

We set out in its entirety the record relating to the incident. The question precipitating the objectionable response was asked by the district attorney:

> "Q. Continue if you will, Deputy, the reasons why you believe this Defendant committed the offense.
>
> "A. The night of the fire, Mr. Murphy made no effort to contact the Fire Department or anybody else. Mr. Maston Murphy and Mr. R. B. Day came back to the scene and Mr. Maston Murphy is the one that ran across the road to get somebody to call the Fire Department. Mr.

> Murphy never made an attempt to call anybody. At that time, he was the only one there other than the deceased. The other two subjects had been there earlier, had left and due to the time element that this fire, from the time it started and the time it was completly engulfed was extremely fast time. The other two subjects were at another location at this time. Also, we talked with the other people through some more investigation type deal, also, there was some polygraphs taken, given to everybody.
>
> "THE COURT: No, no, no.
>
> "[DEFENDANT'S ATTORNEY]: Now, just a minute. Well, I'm going to move for mistrial. No question, I can show you case after case on it. I didn't ask the question.
>
> "THE COURT: Well, let's discuss it outside the presence of the jury."*

Immediately upon the return of the jury, the Court instructed the jury that "you are not to consider that statement for any purpose whatsoever. It is stricken so far as you're concerned from the record. And you're not to consider it for any purpose." Appellant's motion for mistrial was overruled.

The objectionable nature of the question asked Deputy Brandon was apparent before the examiner was half through propounding it. It included the word "why" in an open-end invitation to a potentially damaging answer to defendant's cause unless defense counsel knew something not otherwise apparent from our record. Yet, appellant's counsel remained seated, quietly according to

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* Attention is called to the remark by the Court in the discussion out of the jury's presence: "[The witness] [d]idn't say who, didn't say whether the Defendant or other people [took the polygraph test]."

our record, while Deputy Brandon continued with his reasons *why* appellant was guilty. It was the Court—not appellant—who interjected the first complaint to the challenged statement.

In this position, appellant is confronted with the well established rule, as stated in *Ford v. State,* 500 S.W.2d 827, 829 (Tex. Cr. App. 1973):

> "An objection must be made as soon as the ground of objection becomes apparent."

Accord: Marini v. State, 593 S.W.2d 709, 714 (Tex. Cr. App. 1980); *Garcia v. State,* 573 S.W.2d 12, 16 (Tex. Cr. App. 1978); *Granviel v. State,* 552 S.W.2d 107, 121 (Tex. Cr. App. 1976). See also, *Guzman v. State,* 521 S.W.2d 267, 269 (Tex. Cr. App. 1975).

Indeed, from our review of the record, only the Court made an objection in the presence of the jury. In the jury's absence, counsel for appellant did make his displeasure known and argued for a motion for mistrial. But, the cold and hard fact remains that he was seated while a peace officer was on the stand answering a "why" question as to his client's guilt. Counsel was not upon his feet objecting to an invitation to a damaging answer.

Moreover, the holding in *Mahaffey v. State,* 471 S.W. 2d 801, 805 (Tex. Cr. App. 1971), is applicable here:

> "When a witness is asked a 'why' question, which the one at bar is, the witness may give his reasons whether they be founded upon fact, fiction or mere suspicion. See People v. Beasley, 163 Cal. App. 2d 22, 328 P.2d 834, and People v. Page, 28 Cal. App.

> 2d 642, 83 P.2d 77. Appellant should have objected at the time the question was asked, and not waited for the witness to respond."

We readily concede that testimony concerning a polygraph examination is inadmissible for all purposes in the trial of criminal cases in this state. See, e.g., *Romero v. State,* 493 S.W.2d 206 (Tex. Cr. App. 1973), and its progeny. See also, *Huff v. State,* 576 S.W.2d 645, 648 (Tex. Cr. App. 1979), and authorities therein cited.

We are also cognizant of the rule enunciated very recently in *Richardson v. State,* 624 S.W.2d 912, 914-915 (Tex. Cr. App. 1981), holding that, generally, an instruction to disregard will cure any unresponsive answer. This further holding in *Richardson* is directly in point here:

> "[In three cited cases] it was held that where a witness gives an unresponsive answer which mentions a polygraph test but does not mention the results of such test, there is no error in failing to grant a mistrial where the objection has been sustained and the jury instructed to disregard."

Ground four is overruled.

The judgment of the trial court is affirmed. All justices agree on Part I of this opinion; Chief Justice Dies notes his dissent as to Part II by separate opinion.

PER CURIAM

Opinion delivered
September 29, 1982

Do not publish.

Dissenting Opinion

With respect I dissent from Part II of the majority opinion (Ground of Error No. 4). It is difficult to argue with the authorities cited by the majority, but the time comes when an appellate court must protect a defendant in spite of his counsel's mistakes. This is one of those times.

The admission of a polygraph test is inadmissible for all purposes whether proffered by the prosecution or the defense. *Fernandez v. State,* 564 S.W.2d 771 (Tex. Cr. App. 1978); *Huff v. State,* 576 S.W.2d 645 (Tex. Cr. App. 1979). This applies even if both sides offer to stipulate to the test and its results. *Romero v. State,* 493 S.W.2d 206 (Tex. Cr. App. 1973). In *Nichols v. State,* 378 S.W.2d 335 (Tex. Cr. App. 1964), the prosecutrix was permitted to testify on redirect as follows:

> "Q. [by the prosecutor] Without telling me any results, did you take a lie detector test about this?
>
> "DEFENSE COUNSEL: I object.
>
> "A. [by witness] Yes Sir."

The defense objection in *Nichols v. State,* supra, was sustained, and the jury was instructed to disregard the question and answer. The Texas Court of Criminal Appeals reversed the conviction and stated:

> "The state not only inquired about a test, the results of which were not admissible, but when it asked the question and received an affirmative reply it no doubt very effectively bolstered the prosecutrix's testimony before the jury. This, we think was highly prejudicial to the rights of appellant, and the harm done was so great that *no instruction from the court could remove it. This testimony in effect*

revealed the results of the lie detector test and this was inadmissible. (Emphasis supplied.)

There were several individuals involved in the tragic case at bar, and under investigation, and the officer's testimony certainly informed the jury that everyone but appellant "passed." Here follows the colloquy between the prosecutor and the deputy:

"Q. [by the prosecutor] Continue if you will, Deputy, the reasons why you believe this defendant committed the offense." [a duty clearly consigned completely to the jury].

At this point, the deputy did continue with his reasons, then testified:

"Also, we talked with the other people through some more investigation type deal, *also, there was some polygraphs taken, given to everybody.*" (Emphasis supplied.)

Officers of the law know, or should be instructed before testifying, that polygraph tests are inadmissible and if injected before a jury will result in a reversal.

Where it appears that the evidence is of such a character as to suggest the impossibility of withdrawing the prejudicial effect on the jurors, as in the case at bar, an instruction from the court to disregard does not cure the defect. *Cavender v. State,* 547 S.W.2d 601 (Tex. Cr. App. 1977); *Crawford v. State,* 603 S.W.2d 874 (Tex. Cr. App. 1980); *Ladd v. State,* 629 S.W.2d 139 (Tex. App.—Dallas 1982). In *Ladd v. State,* supra, the prosecutor asked the following question to an officer called by the State:

"Q. Now, just so the jury will understand procedurally what did take place, Officer Rose, I will ask you when the first moment in time was that you considered this Defendant to be a suspect in this case?

"A. I considered him to be a suspect after he had admitted killing the woman."

The trial court sustained an objection by defense counsel and instructed the jury to disregard the same. The court held that the instruction did not cure the harm.

The case at bar cries out for a new trial, and I would reverse and remand.

Martin Dies, Jr.
Chief Justice

September 29, 1982

APPENDIX B

Clyde Clifton MURPHY, Appellant,

v.

The STATE of Texas, Appellee.

No. 912-82.

Court of Criminal Appeals of Texas,
En Banc.

Dec. 21, 1983.

Dissenting Opinion Overruling
Rehearing Feb. 8, 1984.

Defendant was convicted in the 59th Judicial District Court, Angelina County, David Walker, J., of murder, and he appealed. The Court of Appeals affirmed. On defendant's petition for discretionary review, the Court of Criminal Appeals, Tom G. Davis, J., held that: (1) omission of constituent element of underlying felony of arson of "knowing the habitation is insured" did not render indictment or charge to jury fundamentally defective; (2) defendant's act of arson in setting habitation on fire and resulting homicide of victim were not one in same, so that felony-murder merger doctrine did not bar prosecution; and (3) mental state of intent accompanying underlying felony of arson supplied mental state for act of felony-murder, so that neither indictment nor charge to jury were fundamentally defective for failure to have described any culpable mental state to conduct attributed to defendant.

Affirmed.

Teague, J., dissented from overruling of motion for rehearing and filed opinion.

Percy Foreman, Lewis Dickson, Houston, for appellant. (On Appeal only)

Gerald A. Goodwin, Dist. Atty., Joe Crawford and Wesley Hoyt, Asst. Dist. Attys., Lufkin, Robert Huttash, State's Atty., Austin, for the State.

Before the Court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

TOM G. DAVIS, Judge.

Appeal is taken from a conviction for murder. The jury assessed punishment at 99 years and a fine of $10,000.00. The conviction was affirmed by the Beaumont Court of Appeals, Ninth Supreme Judicial District. We granted appellant's petition for discretionary review in order to examine the Court of Appeals' holding that neither the indictment nor the trial court's charge is fundamentally defective and that the felony murder merger doctrine does not apply in this case.

The indictment alleges appellant, on February 9, 1980, "did then and there commit the felony offense of arson by then and there starting a fire in a habitation . . . owned by Clyde Clifton Murphy, with intent to damage and destroy said habitation and to collect insurance for such damage and destruction, and while in the course of and furtherance of the commission of said offense did then and there commit an act clearly dangerous to human life, to-wit: did start a fire in a habitation, and did thereby cause the death of an individual, John Thomas Johnson."

Appellant contends the indictment is fundamentally defective "because the State erroneously set out the constituent elements of the underlying arson under a partially repealed version" of V.T.C.A. Penal Code, Sec. 28.02. Effective Sept. 1, 1979, Sec. 28.02, supra, was amended to read as follows:

> "(a) A person commits an offense if he starts a fire or causes an explosion with intent to destroy or damage any building, habitation, or vehicle:
>
> ". . .
>
> "(2) knowing that it is insured against damage or destruction;"[1]

Because it omits the phrase "knowing it [the habitation] is insured against damage or destruction," appellant argues the indictment is fundamentally defective.

[1, 2] If a charging instrument omits specific reference to a word, term, or phrase that is a constituent element of the offense but, from reading the indictment as a whole, that element is supplied by *necessary* inclusion within an expressed word, term, or phrase, then the failure to specifically plead the word, term, or phrase will not render the charging instrument fundamentally defective. *Dennis v. State,* 647 S.W.2d 275 (Tex. Cr. App. 1983). See also Art. 21.17, V.A.C.C.P. In order to possess the intent to collect insurance for the damage and destruction as alleged in the indictment, appellant *necessarily* had to

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1. Prior to amendment Sec. 28.02, supra, read as follows:
"(a) A person commits an offense if he starts a fire or causes an explosion:
". . .
"(2) with intent to destroy or damage a building or habitation to collect insurance for the damage or destruction."

know the house was insured. The constituent element of "knowing the habitation is insured" therefore is supplied by necessary inclusion within an expressed word, term, or phrase in the charging instrument. We find the indictment is not fundamentally defective.

[3] Appellant also contends the trial court's charge is fundamentally defective because it too instructed the jury in the language of prior Sec. 28.02, supra. The court charged the jury as follows:

> "A person commits the offense of arson if he starts a fire with intent to destroy or damage any building to collect insurance for the damage or destruction.
>
> ". . .
>
> "Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Clyde Clifton Murphy, did . . . commit the felony offense of Arson by then and there starting a fire in a habitation located in Angelina County, Texas, owned by Clyde Clifton Murphy, with intent to damage and destroy said habitation and to collect insurance for such damage and destruction, and while in the course of and furtherance of the commission of said offense did then and there commit an act clearly dangerous to human life, to wit: did start a fire in a habitation, and did thereby cause the death of an individual, John Thomas Johnson, you will find the defendant guilty."

Because the court's charge required the jury to find appellant had the intent to collect insurance for the damage and destruction to the habitation, it necessarily required the jury to find appellant knew the habitation was insured. We find the trial court's charge is not fundamentally defective.

Appellant further maintains the merger doctrine operates as a bar to his prosecution for felony murder. He argues, "the conduct that allegedly constituted the gist of the underlying felony, namely, 'starting a fire,' was the exact same act alleged to have been clearly dangerous to human life and thus was 'inherent in the homicide.' "

Sec. 19.02(a)(3), supra, the "felony murder rule," provides that a person commits an offense if he:

> "commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt . . . he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

In *Garrett v. State,* 573 S.W.2d 543 (Tex. Cr. App. 1978), however, we held that the felony murder doctrine does not apply where the precedent felony is an assault inherent in the homicide. Garrett's conviction could not stand because the underlying aggravated assault and the act resulting in the homicide were one and the same. This limitation on the felony-murder rule is known as the merger doctrine.

[4] In the instant cause, the indictment alleges and the proof shows that appellant was engaged in felonious criminal conduct, namely, arson at the time the deceased was killed. Therefore, as required in *Garrett,* there was a showing of felonious criminal conduct other than the assault which caused the homicide. Unlike *Garrett,* appellant's act of arson in setting a habitation on fire and the resulting homicide of the victim were not one in the same. In this case, appellant attempted to set fire to a

house in order to destroy it and collect insurance money, a property offense, and in the furtherance of such offense, the deceased was killed.

[5] That the felony murder rule was intended by the Legislature to be applied to homicides perpetrated in the course of and in furtherance of the commission of arson is clear from the Practice Commentary to Sec. 28.02:

> "Causing the death [of any person] . . . ordinarily would constitute murder under Section 19.02(a)(3) and be punishable as a first-degree felony."

Appellant is incorrect in his assertion that *Garrett* requires the reversal of his conviction.

Lastly, appellant contends both the indictment and the trial court's charge are fundamentally defective for failure "to ascribe any culpable mental state to the conduct attributed to appellant." He maintains the indictment failed to allege, and the court's charge failed to instruct the jury to find, (a) he intentionally or knowingly committed arson; (b) he intentionally or knowingly committed an act clearly dangerous to human life.

[6] The Practice Commentary notes that "the mental element required under Sec. 28.02 is intent;" that is, "starts a fire or causes an explosion with intent to destroy or damage . . . knowing . . ." No mental state, therefore, is required under Sec. 28.02, supra, for "starting a fire."

[7-9] Furthermore, a felony murder situation implicates the theory of transferred intent. *Kuykendall v. State*, 609 S.W.2d 791 (Tex. Cr. App. 1980). The culpable mental state for the act of murder is supplied by the mental state accompanying the underlying felony giving

rise to the act. *Rodriquez v. State,* 548 S.W.2d 26 (Tex. Cr. App. 1977). The mental state of *intent* accompanying the underlying felony of arson thus supplies the mental state for the act of felony murder. It is unnecessary to allege additional mental states in the indictment or to instruct the jury they must find appellant "intentionally or knowingly committed arson" and "intentionally or knowingly committed an act clearly dangerous to human life." No error is shown.

The judgment of the Court of Appeals is affirmed.

OVERRULING OF APPELLANT'S MOTION FOR REHEARING

TEAGUE, Judge, dissenting.

Because I find that the majority erroneously overrules appellant's motion for rehearing without opinion, I am compelled to dissent.

The original opinion in this cause should either be withdrawn or overruled because it erroneously concluded that the death of the deceased was not caused by the same act which constituted the commission of the offense of arson. However, the indictment in this cause alleges on its face that the starting of the fire was the act which constituted both the underlying offense of arson *and* the "clearly dangerous" act which caused the death. Of course, the State was not required to allege the act which constituted the arson. However, once it did, it was then bound by its allegations.

I now find that it is clear as crystal that the State's reliance upon the same act to constitute both the underlying felony offense of arson and the act clearly danger-

ous to human life which caused the death of the deceased violates the doctrine of merger in that the only act shown to be the commission of the offense of arson, the underlying felony, is one and the same act which caused the death of the deceased. Furthermore, appellant's counsel has clearly pointed out in the briefs he has filed with this Court that V.T.C.A., Penal Code, Section 19.02 (a)(3), the felony-murder statute, contemplates that a homicide can become murder, when not committed intentionally or knowingly, only if the act which causes the death occurs in the course of and in furtherance of the commission of or attempt to commit a felony other than voluntary or involuntary manslaughter, or in flight from such commission or attempt. Thus, it follows that the homicide can become murder only when some act evidencing the commission or attempted commission of the underlying felony offense is separate and distinct from the act which causes the death of the deceased.

This limitation on the felony-murder rule can easily be seen in both *Aguirre v. State,* ____S.W.2d____ (Tex. Cr. App. 1984) (Presently pending on rehearing. See our cause number 62,033, original opinion handed down on July 14, 1982), and *Garrett v. State,* 573 S.W.2d 543 (Tex. Cr. App. 1978).

I acknowledge that *Garrett v. State,* supra, can be distinguished from both *Aguirre v. State,* supra, and this cause, because it concerned an assault as the underlying offense whereas in *Aguirre v. State,* supra, and this cause the underlying felony is a non-assaultive offense. Nevertheless, the "same act" doctrine applied in *Garrett v. State,* supra, is applicable to both this cause and *Aguirre v. State,* supra.

The applicability of the "same act" doctrine is also reflected in the fact that in 1981 the Legislature amended V.T.C.A., Penal Code, Section 28.02, the arson statute, which occurred after the instant offense was committed, but before *Aguirre v. State,* supra, was delivered. Where the arson causes a death, the amended statute provides that the range of punishment for that offense is the same as that for the offense of murder. Thus, the amendment to the arson statute at least indicates that the Legislature intended for a death caused by arson to be treated as seriously as the offense of murder, even though the death that was caused by the arson is not a murder per se. If any death caused by the commission of the offense of arson would constitute murder, this would render the amendment a meaningless act on the part of the Legislature because the offense of causing death by arson was already punishable as a first degree felony under the felony-murder statute.

Appellant's contention that the State relied upon the same act to constitute both the underlying felony offense of arson and the act clearly dangerous to human life which caused the death of the deceased should be sustained.

I have also found that there is another reason why appellant's motion for rehearing should be granted, and that is because an allegation of "intent to collect insurance" does not necessarily include knowledge that the ostensibly insured object or person is insured.

In *Dennis v. State,* 647 S.W.2d 275 (Tex. Cr. App. 1983), this Court held that where an indictment omits an element of an offense as it is defined, the indictment becomes fundamentally defective unless language in the

indictment necessarily includes the omitted element. This Court also noted that an allegation of knowledge carries with it an implication that the thing known is a fact which actually exists. In contrast, an allegation of "belief" merely refers to the defendant's subjective state of mind, and does not necessarily mean the thing believed is an actual fact in existence. This distinction is also reflected in several opinions holding that a habeas corpus affidavit referring to the applicant's belief is insufficient. See *Ex parte Young,* 418 S.W.2d 824 (Tex. Cr. App. 1967); *Ex parte Jackson,* 616 S.W.2d 625 (Tex. Cr. App. 1981); *Ex parte Brooks,* 637 S.W.2d 955 (Tex. Cr. App. 1982). Therefore, "intent," like "belief," merely refers to the subjective state of the mind of the defendant. In this instance, appellant may have intended to collect insurance when he set fire to the house, yet he might not have "known" it was uninsured because the insurance policy had lapsed.

Since September 1, 1979, the offense of arson, as relevant to the facts of this case, has required that the person starting a fire must do so with the intent to destroy or damage the habitation, and must do so "knowing that it is insured against damage or destruction." Thus, in light of the above, the habitation must in fact be insured against damage or destruction at the time the fire is set before the setting of the fire can constitute the offense of arson. In this cause, the charge to the jury allowed the jury to convict appellant of murder if they only found appellant had committed arson by setting the house on fire with intent to collect insurance. However, it was not required to find either that appellant knew that the house was insured or that the house was in fact insured. Therefore,

the charge to the jury was fundamentally defective because it did not require the jury to find all of the elements necessary to constitute the offense of arson, which, of course, was a necessary predicate before appellant could be found guilty of felony-murder.

For the above reasons, I dissent to the overruling of appellant's motion for rehearing without written opinion.

APPENDIX C

COURT OF CRIMINAL APPEALS
P. O. Box 12308
Capitol Station
Austin, Texas 78711

March 7, 1984

Court of Criminal Appeals Number 0912-82

Court of Appeals Number 09-81-069

In Re: Murphy, Clyde Clifton

Dear Counsel:

On this date the Appellant's Motion for Rehearing on the Petition for Discretionary Review in the above styled cause has been DENIED.

Thomas Lowe
Clerk

TL/se

APPENDIX D

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors for the County of Angelina, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the April/June Term, A.D. 1980, of the 159th Judicial District Court of said County, upon their oaths present in and to said Court, that Clyde Clifton Murphy, on or about the 9th day of February, A.D. 1980, and before the presentment of this indictment, in said County and State, did then and there commit the felony offense of Arson by then and there starting a fire in a habitation located in Angelina County, Texas, owned by Clyde Clifton Murphy, with intent to damage and destroy said habitation and to collect insurance for such damage and destruction, and while in the course of and furtherance of the commission of said offense did then and there commit an act clearly dangerous to human life, to-wit: did start a fire in a habitation, and did thereby cause the death of an individual, John Thomas Johnson;

Against the peace and dignity of the State.

/s/ FREDERIC W. JACOBS
Foreman of the Grand Jury.